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No. 83-1818

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

DONNA HYLIN, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF DONALD HYLIN, DECEASED

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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In our petition we argued, inter alia, that the United States is not liable to respondent because her claim that her husband died due to the alleged negligence of a federal mine inspector was barred by the "discretionary function" exception of the Federal Tort Claims Act, 28 U.S.C. 2680(a). We suggested that the petition be held pending the disposition of *United States* v. *S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines),* No. 82-1349 (June 19, 1984), in which a similar issue had been presented, and then disposed of as appropriate in light of that decision. This Court has now decided *Varig Airlines* and unanimously held that the discretionary function exception bars all claims against the United States based on the efforts of the Federal Aviation Administration to regulate air safety through its inspection program. We submit that this holding is equally applicable

to the regulatory activities of federal mine inspectors. Accordingly, the judgment of the court of appeals should be vacated and the case remanded for reconsideration in light of *Varig Airlines*.[1]

The federal government's mine safety regulatory program is indistinguishable from the FAA's air safety program. As this Court explained in *Varig Airlines*, slip op. 6, under the Federal Aviation Act of 1958, the Secretary of Transportation has been delegated authority to establish safety standards and to develop a system of inspections, 49 U.S.C. 1421(a)(1) and (3), but the responsibility for compliance with the standards remains with the owner or operator of the aircraft. 49 U.S.C. 1421(b), 1425(a). Similarly, the Secretary of the Interior was delegated authority under the Federal Metal and Nonmetallic Mine Safety Act of 1969, Pub. L. No. 89-577, 80 Stat. 772 *et seq.*, to set "mandatory standards" for mine safety and to provide for health and safety inspections, which in 1977 were performed by the Mine Enforcement and Safety Administration (MESA).

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[1]Respondent seeks to distinguish this case from *Varig Airlines* on the ground that she relied at trial on a different aspect of the good samaritan doctrine. Respondent emphasizes that the government was held liable here because it "actually worsened the risk of death and injury during its mine safety inspection," not because of "a mere failure to detect a risk" (Br. in Opp. 1; see also *id.* at 1 n.*, 11-12). But this Court in *Varig Airlines* expressly declined to rest its decision on the application of the good samaritan doctrine to the FAA's certification process. See slip op. 17 n.12. Rather, as the Seventh Circuit recently observed, *Varig Airlines* "was decided on the 'discretionary function' exception to the FTCA." *Arvanis* v. *Noslo Engineering Consultants, Inc.*, No. 83-1670 (July 31, 1984), slip op. 6 n.4.

Respondent has conceded (Br. in Opp. 3) that the discretionary function contention we made in *Varig Airlines* is controlling in this case. Respondent explained that with respect to our contention that the government, in conducting regulatory inspections, has "absolute immunity from federal tort claims act liability," this case does "have an issue in common with" *Varig Airlines*.

§ 8, 80 Stat. 775.[2] But the Mine Safety Act left no doubt that the mine owner retained "the primary responsibility to prevent the existence of [unhealthy and unsafe] conditions and practices in such mines." 30 U.S.C. (1976 ed.) 801(e). To implement this requirement, MESA's regulations imposed a duty on the employer to "establish a definite, effective, and continually functioning safety program and make every attempt to prevent accidents and increase safety." 30 C.F.R. 56.18-1 (1977). Also, "[r]egular safety inspections should be made by company officials or safety committees." 30 C.F.R. 56.18-2 (1977). Compare *Varig Airlines*, slip op. 8, 17. Thus, in both *Varig Airlines* and here, the federal government's role was solely to regulate compliance by private industry with federal safety standards.

Like the FAA (see *Varig Airlines*, slip op. 9, 18-22), MESA did not purport to guarantee mine safety; nor could it. With approximately 300 mine inspectors, MESA was responsible for overseeing health and safety at 11,600 active and 4,000 intermittently operated (seasonal or on demand) mines. In 1977, MESA conducted over 37,000 inspections. See *Interior Dep't Ann. Rep. to Congress* 5, 15 (1977). Compare *United States* v. *Varig Airlines*, slip op. 9 ("[w]ith fewer than 400 engineers, the FAA obviously cannot complete this elaborate compliance review process alone"). MESA's regulatory scheme was no more suitable to uncovering all safety defects than the FAA's. As the Secretary pointed out in his 1977 Annual Report to Congress (at 9):

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[2]As we explained in the petition (Pet. 2 n.1) the Mine Safety Act was repealed after the accident in this case, but the regulatory system has remained essentially unchanged.

> Regulations and their enforcement alone cannot make a mine a safe place to work. Mining involves unavoidable and calculated risks * * *. It is most important that people (operators, supervisors, and miners) employed in mining be schooled in recognition and elimination of these hazards.

MESA's effort to "spot" violations of its safety standards during relatively brief inspections of mines was very similar to the FAA's inspection program; it was the quintessential governmental effort to encourage private industry to comply with the law. See Pet. 11-12. This Court in *Varig Airlines* held that "whatever else the discretionary function exception may include, it plainly was intended to encompass the discretionary acts of the Government acting in its role as a regulator of private individuals." Slip op. 15 (footnote omitted). Since respondent's claim arises directly out of MESA's activities as "regulator of private individuals," her claim is barred by 28 U.S.C. 2680(a).

CONCLUSION

For these reasons, and those stated in the petition, the petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded for reconsideration in light of *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, No. 82-1349 (June 19, 1984).

Respectfully submitted.

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AUGUST 1984

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